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No. 05-184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MILITARY LAW HISTORIANS, SCHOLARS, AND PRACTITIONERS (Military Commissions and the Articles of War)

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INS v. *Chadha*, 462 U.S. 919 (1983) 11, 12

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 488 U.S. 607 (1980) 10

J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928) 10

Korematsu v. *United States*, 323 U.S. 214 (1944) 28

Cited Authorities

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Leedom v. *Kyne*,
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Loving v. *United States*,
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Tagg Bros. & Moorhead v. *United States*,
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Cited Authorities

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United States v. *Bin Laden*,
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10 U.S.C. § 821 8

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18 U.S.C. § 2339D 16

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Act of Apr. 10, 1806, 2 Stat. 359 (1845) 22

Act of Aug. 29, 1916, § 1342, art. 38, 39 Stat. 418, 656 4

Cited Authorities

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Armies of the United States, Apr. 10, 1806, 2 Stat. 359, 367, 371 (1845) 4

Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903, § 1989a 28

Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) 16

Headquarters, Division of the Philippines, G.O. 31, Jun. 11, 1900 in 2 S. Doc. 57-1, at 9 26

Headquarters, Division of the Philippines, G.O. 179, Jul. 19, 1901, in Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 26

LEGISLATIVE MATERIALS:

House of Representatives Report to accompany H.R. 7049, *as reprinted in* 1956 U.S.C.C.A.N. 4613, 4620 21

House of Representatives Report No. 101-665, at 334 *as reprinted in* 1990 U.S.C.C.A.N. 2931, 3060 21

Senate Report No. 81-486, *as reprinted in* 1950 U.S.C.C.A.N. 2222, 2241 21

Cited Authorities

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Senate Report No. 96-197, at 123-25 *as reprinted in* 1979 U.S.C.C.A.N. 1818, 1828-30 21

Revision of the Articles of War: Hearing on S. 3191 Before the S. Subcomm. on Military Affairs, 64th Cong. 40 (1916) 19, 20

Revision of the Articles of War: Hearing on H.R. *23628 Before the H. Comm. on Military Affairs*, 62d Cong. 39 (1912) 19

RULES, REGULATIONS AND ADMINISTRATIVE MATERIALS:

Fed. R. Evid. 401-03 29

Fed. R. Evid. 801-07 29

Executive Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) 3, 14, 28, 29

2 Op. Att'y Gen. 344 (1830) 25

17 Op. Att'y Gen. 310 (1882) 25

Cited Authorities

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OTHER AUTHORITIES:

David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5 (*forthcoming Feb. 2006*) ..... *passim*

DAVID A. LOCKMILLER, ENOCH H. CROWDER 66-84 (1955) 26

David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 Military L. Rev. 129, 140 (1980) 6

I Richard J. Pierce, ADMINISTRATIVE LAW TREATISE § 1.4 (2002) 13

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INTERESTS OF THE *AMICI CURIAE* *

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Amici express no opinion as to the guilt or innocence of Petitioner Salim Ahmed Hamdan on the offenses with which he is charged. However, *amici* agree with the district court's ruling that the procedures set forth for the military commission established to adjudicate the charges against Hamdan, as prescribed by the President's executive order, are unlawful.

At this point in our nation's history, it is vitally important to reaffirm our commitment to the rule of law in order to secure key moral and legal terrain in the global war on terrorism. To

permit these military commissions to go forward as currently constituted would indelibly stain the nation's reputation and undermine its larger efforts in the war on terrorism.

SUMMARY OF THE ARGUMENT

Contrary to congressional enactment and historical practice, the President has claimed the authority to adopt procedures for "military commissions" which lack the following core procedural safeguards: (1) neutral decisionmakers; (2) critical evidentiary protections; and (3) judicial review. When Congress authorized the President to conduct military commissions, it did not give him unlimited power to define their procedures. Two sources limit the President's power to fashion procedures for military commissions. First, in Article 36 of the Uniform Code of Military Justice ("Article 36"), 10 U.S.C. § 836 (2005), Congress directed the President to apply, in military commissions, the principles of law and rules of evidence generally recognized in the United States district courts unless their application would be impracticable. Second, the President's power is limited by the historical understanding of what constitutes a "military commission," because Congress used a legal term of art in Article 36 that had an established historical meaning at the time Article 36 was enacted.

In his November 13, 2001 Executive Order (the "Military Order"), the President surpassed the limits on his authority to fashion procedures for military commissions. Because the President's global impracticability finding was arbitrary and capricious, the Military Order purporting to authorize the military commissions to deviate from the principles of law and rules of evidence generally recognized in the United States district courts exceeds the President's authority under Article 36. The military commissions created by the Military Order also lack the core procedural safeguards found in historical military commissions.

ARGUMENT

A. CONGRESS HAS ULTIMATE AUTHORITY OVER THE CREATION OF MILITARY COMMISSIONS.

The most accurate historical understanding of military commissions is that the ultimate authority to create procedures for such commissions belongs to the Congress. Once Congress has used its authority, the President's authority is superseded.

1. The Constitution Gives Congress Authority Over the Procedures and Regulations for Military Commissions.

The Constitution establishes legislative supremacy over military justice and violations of customary international law. Although the President is made "Commander in Chief of the Army and Navy of the United States," U.S. Const. art II, § 2, cl. 1, Article I grants Congress, not the President, power to "make Rules for the Government and Regulation of the land and naval forces," U.S. Const. art. I, § 8, cl. 14, and to "define and punish . . . offences against the law of nations." U.S. Const. art. I, § 8, cl. 10. As this Court has recognized, "Congress . . . exercises a power of precedence over, not exclusion of, Executive authority" in this area of law. *Loving* v. *United States*, 517 U.S. 748, 767 (1991).[1]

---

1. Congress did not give the President authority to review findings of courts-martial until 1806. See Act of Apr. 10, 1806, 2 Stat. 359 (1845). Limited authority to issue supplemental rules of procedure for courts-martial and military commissions did not follow until 1916. See Act of Aug. 29, 1916, § 1342, art. 38, 39 Stat. 418, 656; David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 62-66 (forthcoming Feb. 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=811045 (hereinafter "Glazier, *Precedents Lost*").

The Government has argued strenuously that the President has the inherent power, as Commander in Chief, to create military commissions even in the absence of congressional authorization. That proposition finds some limited support in the early historical practice of the Executive and in certain precedents of this Court; yet it does not address the question presented. While the Commander in Chief may possess power to create military commissions in response to certain exigencies of war or military occupation, that power does not authorize him to disregard constitutional, customary, or congressionally dictated procedural norms. Rather, such discretion as he possesses is limited by historical precedent and by Congress's constitutional authority.

As the Government conceded in its brief to the Court of Appeals, the "history of military practice [with respect to military commissions] is legally significant." (Brief for Appellants, Appeal No. 04-5393, D.C. Cir., at 60.) It is one-sided, however, to attribute authority to the historical instances in which Chief Executives established commissions in the absence of express congressional authorization, while ignoring the fact that such tribunals as a rule have afforded the accused procedural safeguards that the Guantanamo Bay commissions lack. To the extent that "traditional ways of conducting government . . . give meaning to the Constitution," *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks omitted), they do so not by creating governmental powers *ex nihilo*, nor merely by expanding them *ad infinitum*, but by standing as normative guideposts for their exercise. Precedent may empower, but it also restricts.

More importantly, Congress's constitutional authority over military commission procedure, when exercised, limits

executive action. See *Madsen* v. *Kinsella*, 343 U.S. 341, 348-9 (1952) ("*In the absence of attempts by Congress to limit the President's power*, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions . . . .") (emphasis added). This is an instance in which "the balance" between the branches "already has been struck by the Constitution itself." *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring). Plainly Congress's power to make rules for the governance of land and naval forces would be hollow if the President could trump those rules by issuing a rule of his own in his capacity as Commander in Chief.

2. Congressional Authority over Military Commissions Has Been Recognized by the Executive and Military Officers and in Legislative History.

From its earliest history, America has consistently maintained the view, adopted from Great Britain,[2] that the

2. By the time of the founding of the United States, the British Parliament had asserted substantial control over both the jurisdiction of and procedure for military tribunals. See, e.g., David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 140 (1980). For example, in 1689, Parliament enacted the first of a series of annual Mutiny Acts, allowing the monarchs to hold military trials within the kingdom for those persons and those serious offenses specifically authorized by statute, and establishing mandatory procedural guidelines for the general court-martial such as minimum panel composition. Glazier, *Precedents Lost* at 10-11. By 1775 Parliament allowed the executive to promulgate Articles of War defining lesser offenses and providing military justice procedures effective at home and abroad, with the Articles being issued by a government minister who could be called upon to justify his actions before Parliament. *Id.* at 12-13. At the same time, the overarching Mutiny Acts then regulated the British Army worldwide. *Id.*

legislature maintains ultimate authority over the creation of military commissions and of the procedures used in such commissions. For example, while commanding the standing regiment that Virginia established during the French and Indian War, George Washington refused to execute deserters during a period when the colony's first Mutiny Act had lapsed, on the ground that "we have no law at present to punish them." Letter from George Washington to Robert Dinwiddie, Dec. 10, 1756 *quoted in* Glazier, *Precedents Lost* at 16. Similarly, the second Continental Congress appointed a committee to prepare rules for governing the Army the same day it adopted a resolution calling for raising it, and adopted the first American Articles of War, based indirectly on the British Articles, just sixteen days later on June 30, 1775. See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 21 (2d ed. 1920). These actions recognize both that the rule of law applies even in wartime and that the legislature has supreme authority over military justice.

In the period leading up to the enactment of the Articles of War, American military officers generally rejected any notion of authority beyond specific statutory mandates. For example, when Andrew Jackson attempted to expand military jurisdiction to cover a trial of Louis Louailler in New Orleans in 1815, both his second-in-command and the military trial panel itself rejected all charges not explicitly based on provisions of the Articles of War specifically applicable to non-military persons. Glazier, *Precedents Lost* at 25.[3] When the Army's subsequent commander, General Winfield Scott, created the "military commission" during the Mexican War to fill critical gaps in the statutory Articles of War, he specifically noted that he did so

3. Jackson subsequently directed the execution of two British citizens during the first Seminole War in 1818, but he quickly retreated from any claim that he had done so based on a valid trial after congressional committees criticized his actions. Glazier, *Precedents Lost* at 26-31.

"until Congress could be stimulated to legislate on the subject." *Id.* at 32-33 (quoting WINFIELD SCOTT, 2 MEMOIRS OF LIEUTENANT GENERAL SCOTT 393 (1864)). President Lincoln, despite making extensive use of military commissions, apparently did not question congressional authority over them. *Id.* at 45.

Even more significant is the legislative history behind the predecessor to Article 21 of Uniform Code of Military Justice, 10 U.S.C. § 821. Article 21 states: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." This language, originally proposed by Army Judge Advocate General Enoch H. Crowder in 1912 and enacted by Congress in 1916, has been widely cited by both the executive and judicial branches as congressional authorization for military commission trials. Glazier, *Precedents Lost* at 58-59. Facially Article 21 simply preserves concurrent military commission jurisdiction over offenses "that by statute or by the law of war may be tried by military commissions . . . ." 10 U.S.C. § 821. The impetus behind this article was the concern of the executive branch that statutory expansion of court-martial jurisdiction over persons and offenses previously only triable by military commission would strip the military commission of authority over those persons or crimes. The fact that two Administrations saw the need for this text emphasizes that Congress's power, when exercised, supersedes the President's authority to prescribe rules for military commissions. Glazier, *Precedents Lost* at 62. [4]

4. Because the Military Order is based on an order issued by Franklin D. Roosevelt, it must be noted that even the Roosevelt Administration acknowledged significant, albeit not exclusive, congressional authority over military commissions. Respondent's Answer to Petitions *at* 34.

B. ABSENT A SUFFICIENT IMPRACTICABILITY FINDING, WHEN CONDUCTING MILITARY COMMISSIONS, THE PRESIDENT MUST APPLY THE PRINCIPLES OF LAW AND RULES OF EVIDENCE GENERALLY RECOGNIZED IN THE UNITED STATES DISTRICT COURTS.

In Article 36, Congress delegated to the President limited authority to create rules of procedure for military commissions. In the Military Order, the President exceeded that authority.

1. The Plain Language of Article 36 Provides That the Rules Generally Applied in Military Commissions Are to Be Those Recognized in the District Courts.

Congress provided in Article 36 that:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

By its plain terms, this statute is a delegation of rule-making authority. See *Loving*, 517 U.S. at 769 (referring to Article 36 as "indicative of congressional intent to delegate . . . authority to the President"). It is equally plain that "the delegation is set within boundaries the President may not exceed." *Id.* at 771. Indeed, the statute's constitutionality depends upon the presence of these boundaries, for in delegating its power Congress is required to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928).

Statutory clauses that limit executive discretion under a delegation of legislative authority are construed in favor of stricter limitation, under the doctrine of avoidance of constitutional questions. See *Indus. Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of the statute that avoids [an] open-ended grant [of legislative authority] should certainly be favored."). Under this principle, the limiting language of Article 36 must be given meaningful effect, especially in a case where the President seeks to establish a tribunal that departs from the traditional understanding of military commissions. Cf. *Loving*, 517 U.S. at 772 (rejecting a non-delegation challenge to Article 36, but stating that "[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight.").

Only by making a determination of impracticability can the President escape Congress's requirement that military commissions apply the rules of procedure generally recognized in U.S. district courts. The Military Order

establishing the military commissions contains the President's purported determination of impracticability as authorization for departure from the requirements of Article 36. This determination, however, cannot withstand judicial review.

2. The President Has Not Overcome the Presumption That Congress Intended for His Impracticability Determination to Be Subject to Judicial Review.

The Government wrongly contends that the President's impracticability finding is not subject to judicial review. "[W]hen a Government official's determination of a fact or circumstance . . . is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'" *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 424 (1995). This Court has "stated time and again that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Id.* (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds as recognized by Califano* v. *Sanders*, 430 U.S. 99 (1977)); see also *Leedom* v. *Kyne*, 358 U.S. 184, 191 (1958) (holding reviewable NLRB certification of a mixed bargaining unit); *Bd. of Governors of Fed. Reserve Sys.* v. *Agnew*, 329 U.S. 441, 444 (1947) (holding reviewable orders of the Federal Reserve Board removing directors of national banks from office). The Court will not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190. "The courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed,' and can enforce adherence to statutory standards." *INS* v.

Chadha, 462 U.S. 919, 953 n.16 (1983) (citation omitted) (quoting *Yakus* v. *United States*, 321 U.S. 414, 425 (1944)).

The presumption of reviewability is a natural result of the non-delegation doctrine, which forbids Congress from delegating legislative power to the executive. According to the non-delegation doctrine, Congress must supply the executive with an "intelligible principle" to guide the executive's exercise of quasi-legislative power. *Loving*, 517 U.S. at 758-59; *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Thus, congressional delegations of power to the executive are not "unbounded, and it is the duty of a reviewing court to determine whether the course followed by the [executive] is consistent with its mandate from Congress." *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973).

In this case, the President has not overcome the presumption that courts are empowered to review the impracticability determination required by Article 36 for the President to authorize deviations from the "principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836.

3. The President's Impracticability Determination Should Be Reviewed Under the "Arbitrary or Capricious" Standard.

Prior to the adoption of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, the Supreme Court reviewed executive orders affecting individual rights to determine whether they were arbitrary and capricious and whether executive findings were supported by substantial evidence. See, *e.g.*, *Shields* v. *Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938) ("The sole remaining question would be whether the Commission in arriving at its determination

departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious."); *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88 (1913). Before the enactment of the APA, the Court had developed a federal common law of administrative review as a form of statutory gap-filling. Cf. *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) ("[T]he inevitable incompleteness presented by all legislation means that . . . . federal courts [have the power] to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.").

In other words, Congress had delegated a large amount of power and discretion to executive agencies, but prior to the enactment of the APA, Congress had not specified what level of deference the courts should show to most agency determinations. See generally I Richard J. Pierce, ADMINISTRATIVE LAW TREATISE § 1.4 (2002). The Court responded by creating a deferential standard of review for executive actions—the Court would not overturn an administrative decision unless it was without evidentiary support or arbitrary and capricious. See, *e.g.*, *Shields*, 305 U.S. at 185; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 444 (1930).

In 1946, Congress enacted the APA, which largely codified and supplemented the body of federal common law that had developed in this area. The APA did not, however, purport to *overrule* the existing body of federal common administrative law in areas to which it did not apply. Instead, the APA simply does not speak to what level of deference is due executive action falling outside the ambit of the APA. Thus, in cases involving a challenge to executive action not subject to the APA – like the Military Order at issue in this

case, see 5 U.S.C. §§ 551(1)(F), (H) (excluding authority for passing "significant" executive orders passed during a national emergency or time of war, courts-martial, and military commissions from definition of "Agency" subject to APA); *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that the President is not an "agency" for purposes of the APA) – courts still have the power, under pre-APA federal common law, to review executive orders to determine whether they are arbitrary or capricious.

4. The President's Impracticability Finding Is Arbitrary and Capricious.

Though Article 36 authorizes the President to prescribe rules of procedure for courts-martial, military commissions, and other tribunals (such as a board of inquiry), such rules must conform to "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836. This "intelligible principle" bounds executive discretion in the grant of regulatory power. See *Loving*, 517 U.S. at 772-773; see also *United States* v. *Curtis*, 32 M.J. 252, 263 (1991). Article 36 also includes a limited exception affording the President discretion to depart from this intelligible principle when he considers such rules to be "impracticable," but neither the text of the President's impracticability finding nor the history of military tribunals provides any evidence that adhering to generally recognized principles of law and rules of evidence would be impracticable in the present case.

The President's Article 36(a) impracticability determination, stated tersely in Section 1(f) of his Military Order, is based solely on "the danger to the safety of the United States and the nature of international terrorism . . . ." 66 Fed. Reg. 57833, § 1(f). This determination neither follows from the considerations cited in Section 1(f) nor the

factual findings that precede it in Sections 1(a)-(e) of the Military Order. Indeed, the Military Order articulates no nexus between its impracticability determination and the procedural rules it establishes for commissions in Section 4. The "danger to the safety of the United States" comes not from the operation of our judicial system or courts-martial, but from the Al Qaeda terror network.

The President's impracticability determination is also at odds with the history of military commissions and similar tribunals, which plainly demonstrates that they can provide baseline procedural and evidentiary fairness while preserving confidentiality, national security, and the need for governmental autonomy. Organized crime kingpins, along with domestic and international terrorists, have been tried, convicted and sentenced in U.S. courts. See, *e.g.*, *United States* v. *Gotti*, 155 F.3d 144 (CA2 1998). The deadliest domestic terrorists in U.S. history, with a demonstrated antipathy to the U.S. government and its legal systems, were tried and convicted in U.S. civilian courts applying traditional procedural and evidentiary rules. See, *e.g.*, *United States* v. *McVeigh*, 153 F.3d 1166 (CA10 1998), *abrogated in part on other grounds by Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). Similarly, the top leaders of Al Qaeda—the same organization that prompted the Military Order—have been tried in federal court (albeit *in absentia*) for their participation in terrorist attacks upon the United States. See *United States* v. *Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (ruling on various motions *in limine* before trial).

There is simply nothing about international terrorism *per se* which suggests that U.S. courts or courts-martial are incapable of adjudicating the guilt of suspected terrorists. See generally PETER BERGEN, HOLY WAR, INC. (2001); NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY (JOHN ARQUILLA, DAVID F. RONFELDT, eds., RAND 2001). Quite to the contrary,

history suggests that U.S. courts are fully capable of trying suspected terrorists while preserving national security. "[T]he nature of international terrorism" does not, without more, justify departure from these U.S. jurisprudential norms.[5] Accordingly, the President's impracticability determination is arbitrary and capricious and should be set aside.

5. The President's Impracticability Finding Is Not Sufficiently Detailed to Allow for Meaningful Judicial Review.

An executive order subject to judicial review must contain specific enough findings of fact and give a clear enough statement of reasoning to allow that judicial review to "fulfill its role effectively." *Black* v. *Romano*, 471 U.S. 606, 618 n.10 (1985) (Marshall J., concurring); see *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 807, *Wolff* v. *McDonnell*, 418 U.S. 539, 565 (1974). "[An] agency must set forth clearly the grounds on which it acted. For '[the Court] must know

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5. Moreover, Congress has codified laws specifically targeting international terrorists and the legal issues associated with adjudicating them. See, *e.g.*, 18 U.S.C. § 2339B (criminalizing material support to foreign terrorist organizations); 18 U.S.C. § 2339D (criminalizing military-style training with a designated foreign terrorist organization); see also 18. U.S.C. § 6001, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (amending the Foreign Intelligence Surveillance Act to authorize clandestine surveillance of individual terrorists not connected to a foreign power). Congress also has legislated how sensitive national security cases that involve concerns of classified information and physical security should be handled. See generally Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980). With these laws and others, Congress has established the legal framework with which to prosecute alleged terrorists in U.S. district courts.

what a decision means before [it can] say whether [the decision] is right or wrong." *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 807.

In this case, the Military Order does not contain sufficient detail to allow for meaningful review of the President's impracticability determination. As noted above, the order contains nothing more than a conclusory assertion that applying the rules of evidence and principles of law generally applicable in the United States district court would be impracticable. Notably absent is any discussion of *why* it would be impracticable, other than the order's use of the vague phrase "the nature of international terrorism." In sum, the President's global finding of impracticability is not sufficiently detailed to allow meaningful judicial review, and the Court should, at a minimum, order the President to give a more thorough explanation of the reasoning underlying his decision.

C. THE PROCEDURES ADOPTED BY THE MILITARY ORDER SHOULD BE REJECTED AS INCONSISTENT WITH THE HISTORICAL UNDERSTANDING OF "MILITARY COMMISSIONS" ENACTED IN ARTICLE 36.

Even if the President could refuse to apply the procedures used in the district courts, the historical understanding of the term "military commission," as enacted in Article 36, independently limits his ability to abandon core procedural safeguards. The Military Order dispenses with those core procedural safeguards and therefore exceeds the President's authority.

1. When Congress Used the Term "Military Commissions" in Article 36 of the Uniform Code of Military Justice, It Intended the President to Act Consistently with the Historical Understanding of What Constitutes a Military Commission.

The statutory provision currently appearing at 10 U.S.C. § 836 was originally enacted as Article 38 of the 1916 Revised Articles of War. See 39 Stat. 656 (1916). This Court has identified as a "cardinal rule of statutory construction" the principle that "[w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). As explained by the author of the Revised Articles at a 1916 congressional hearing, the term "military commission" is such a term of art with a settled meaning comprising certain structures and procedures:

> The military commission—a war court—had its origins in . . . 1847 (Gen[eral] Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen[eral] Scott at the same time, called 'council of war,' with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general

> designation of 'military commission' was retained. The military commission was given statutory recognition in . . . 1863. . . . *Its composition, constitution, and procedure follows the analogy of courts-martial.*

Revision of the Articles of War: Hearing on S. 3191 Before the S. Subcomm. on Military Affairs, 64th Cong. 40 (1916) (citations omitted and emphasis added). This understanding of the military commission necessarily informed the consideration of and ultimate decision to enact the 1916 Revised Articles of War. Because the ultimate goal of statutory construction is to give effect to Congressional intent, Article 36 must be reviewed in the light of this historical backdrop.

Article 36 was intended to give the President only a limited scope of authority to define evidentiary rules to permit publication of an authoritative manual on court-martial procedure. It was drafted to give the President the same power as that historically granted to this Court to prescribe the "mode of proof" in equity, maritime, and admiralty cases. *Revision of the Articles of War: Hearing on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 39 (1912). The drafter of Article 36, Judge Advocate General Crowder, intended to use it to "prescribe how documents should be proved and of what a court-martial should take judicial cognizance." *Id.*

> [Judge Advocate General] Crowder: . . . [I]n the matter of introducing documentary evidence officers of the Army are rarely sufficiently familiar with the rules, and we want an opportunity to promulgate definite rules so that the judge advocate trying a case or the counsel for the defense will know just what formalities to comply

> with in order to get a document before the court. The rules to be promulgated will cover mainly military record evidence.
>
> [Congressman]: I suppose if you get this revision that you or some one [sic] will immediately reduce to a manual of some sort the procedure, etc., under these articles for guidance of the officers?
>
> [Judge Advocate General] Crowder: That will be accomplished by a revision of the present manual of procedure. It will not require very much revision to adapt it to the requirements of these statutes; it will require some amplification.

Id. at 42.

This restrictive view of the President's authority to promulgate regulations was reiterated shortly before the Revised Articles of War were enacted in 1916. Judge Advocate General Crowder then explained the purpose of this provision as follows:

> Even in time of peace military courts are separated from libraries and their only recourse is to manuals to ascertain the proper procedure and the rules of evidence. We wish the authority of this article in order that the President may proceed, with the sanction of statute law, but under authority of Congress, to promulgate modes of proof, so that officers of the Army will be informed through promulgates ruls [sic] of simple methods of proof, where, for example, handwriting is to be established or documents are to be introduced in evidence.

Revision of the Articles of War: Hearing on S. 3191 Before the S. Subcomm. on Military Affairs, 64th Cong. 96 (1916). Judge Advocate General Crowder anticipated that the President "will exercise the authority here sought to be conferred in a *very conservative way*." *Id.* at 97 (emphasis added). Indeed, the

1916 legislative history indicates that while conferring this authority on the President was recognized as "*necessary for attaining the ends of justice*," the power was not "unlimited." *Id.* (emphasis added).

The available legislative history associated with subsequent revisions of Article 36 does not indicate an intention on the part of Congress to expand its scope beyond that originally contemplated in the 1916 Articles of War. See H.R. Rep. No. 101-665 at 334, *as reprinted in* 1990 U.S.C.C.A.N. 2931, 3060; S. Rep. No. 96-197 at 123-25, *as reprinted in* 1979 U.S.C.C.A.N. 1818, 1828-30; H.R. Rep. Accompanying H.R. 7049, *as reprinted in* 1956 U.S.C.C.A.N. 4613, 4620; S. Rep. No. 81-486, *as reprinted in* 1950 U.S.C.C.A.N. 2222, 2241; Glazier, *Precedents Lost* at 76-77. The statutory grant of rulemaking authority to the President was narrow, intended only to permit the promulgation of technical evidentiary rules in court-martial proceedings. The current Manual for Courts-Martial is an appropriate exercise of the President's authority under this statute to provide a comprehensive stand-alone reference for military trials. Article 36 does not, however, confer upon the President an unlimited power to establish procedures for trial by military commission. A military commission itself has certain inherent procedural attributes, departure from which is not authorized by Article 36.

2. Historically, Military Commissions Have Included Core Procedural Safeguards Designed to Provide Defendants with a Fair Opportunity to Rebut the Charges Against Them.

The history of military commissions prior to Congress's 1916 enactment of the predecessor to Article 36 supports the conclusion that "military commission" had already gained a settled meaning as an entity providing a certain set of key procedural safeguards. In particular, in the three contexts prior to 1916 in which military commissions were prominently

used—the Mexican War, the Civil War, and the Philippine Insurrection—military commissions consistently utilized key procedural safeguards that the tribunals established by the Military Order lack. See *infra* Part C.3.

a. The Mexican War: The First Military Commissions Adopted Court-Martial Procedures.

General Winfield Scott, the commander of the United States Army during the Mexican War, created the first military commissions through General Orders (G.O.) No. 20 at Tampico, in order to try common criminal offenses committed by or upon U.S. soldiers. Glazier, *Precedents Lost* at 29 (citing General Winfield Scott, *General Orders (G.O.) No. 20* in ORDERS AND SPECIAL ORDERS, HEADQUARTERS OF THE ARMY, WAR WITH MEXICO, 1847-48 139-40, Vol. 41 1/2 at 140, Records Group 94, National Archives, Washington D.C. (hereinafter "SCOTT ORDERS")). General Scott specifically required that the military commissions use established court-martial procedure:

> Every military commission under this order, will be appointed, governed and limited as prescribed by the 65th, 66th, 67th, and 97th, of the said rules and articles of war, and the proceedings of such commissions will be duly recorded, in writing, reviewed, revised, disapproved or approved, and the sentences executed—all as in the cases of the proceedings and sentences of courts-martial; provided, that no military commission shall try any case clearly cognizable by any court martial.

Id. at 30 (quoting SCOTT ORDERS at 140).[6]

6. The cited Articles of War defined the authority to convene and review general courts-martial (Article 65), defined the authority for regimental and garrison courts (Article 66), limited punishments by lesser tribunals (Article 67), and required separate courts for regular and volunteer soldiers (Article 97). See An Act for Establishing Rules and Articles for the Government of the Armies of the United States, Apr. 10, 1806, 2 Stat. 359, 367, 371 (1845).

Scott established a separate tribunal he called Councils of War for trying law of war violations (or "war crimes"), which differed from the military commissions (and courts-martial) primarily in terms of subject-matter jurisdiction, rather than procedures. *Id.* at 32 (citing SCOTT ORDERS at 367, G.O. 181 (June 19, 1847) and SCOTT ORDERS at 380, G.O. 184 (June 24, 1847)). Scott did adopt more summary procedures for trying "guerillas and rancheros," but those procedures still required the use of trial panels of at least three officers. *Id.* at 32-33(citing SCOTT ORDERS, G.O. 372 (Dec. 12, 1847)).[7] While only twenty-one individuals are documented as having been tried by Councils of War, military commissions tried at least 406 persons in Mexico and California, convicting 231. *Id.* at 33 (citing SCOTT ORDERS, G.O. 372 and Headquarters, Army of Mexico G.O. 37, Mar. 23, 1848, in NAT'L ARCHIVES AND RECORDS SERVICE, ORDERS AND SPECIAL ORDERS ISSUED BY MAJ. GEN. WILLIAM O. BUTLER AND MAJ. GEN. WILLIAM J. WORTH TO THE ARMY IN MEXICO IN 1848, microfilmed on T-1114 (Nat'l Archives Microfilm Publ'ns) (1969)).

b. The Civil War: Procedures in Military Commissions Continued to Conform Closely to Court-Martial Procedures.

The Civil War saw widespread use of the military commission with 4,271 trials documented during the war and another 1,435 during Reconstruction. Glazier, *Precedents Lost* at 37 (citing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168-73, 176-77 (1991)). Notably, properly constituted military commissions continued the practice of close conformance to court-martial procedures. General Henry W. Halleck issued guidance on

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7. *Amici* have located no proof that these summary procedures were ever used during the Mexican War.

the subject in 1862 shortly before he became the General in Chief of the Union Army. General Halleck noted that:

> [I]t is the usage and custom of war among all civilized nations to refer [crimes in occupied or threatened territory] to a duly constituted military tribunal consisting of reliable officers, who acting under the solemnity of an oath and the responsibility always attached to a court of record will examine witnesses, determine the guilt or innocence of parties accused and fix the punishment. This is usually done by courts-martial; but in our country these courts have a very limited jurisdiction both in regard to persons and offenses. Many classes of person cannot be arraigned before such courts for any offense whatsoever, and many crimes committed even by military officers, enlisted men or camp retainers cannot be tried under the "Rules and Articles of War." Military commissions must be resorted to for such cases and these commissions should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.

(*Id.* at 38 (quoting Henry W. Halleck, *Headquarters Department of the Missouri, General Orders No. 1, Jan. 1., 1862*, in 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II, 248 (1894) ("HALLECK ORDERS")). General Halleck enumerated specific examples of the required correlation between the military commission and the court-martial. *Id.* The one departure from court-martial procedures that Halleck endorsed was to permit military commission

panels to consist of three officers, but he directed that "[a] larger number will be detailed where the public service will permit." *Id.* at 38-39 (quoting HALLECK ORDERS at 248). The Secretary of War subsequently endorsed Halleck's chosen military commission procedure. *Id.* at 39 (citing Letter from L. Thomas to Major General J. C. Fremont, Apr. 9, 1862 in 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II 282 (1894)).

c. The Philippine Insurrection: Military Commissions Followed the Scott Model and Used the Same Procedures as Courts-Martial.

The third and final significant use of military commissions prior to the enactment of the predecessor to Article 36 was during the military occupation in the Philippines. Again, there is significant evidence of close procedural conformity between Philippine military commissions and courts-martial, particularly in the faithful application of the common law rules of evidence. By customary practice, reinforced by two Attorney General opinions, U.S. courts-martial employed the common law rules of evidence "recognized and followed by the criminal courts of the country." Glazier, *Precedents Lost* at 51 (quoting William Winthrop, MILITARY LAW AND PRECEDENTS, 472 (2d. ed. 1920), 2 Op. Att'y Gen. 344 (1830) (noting English military adherence to common law rules), and 17 Op. Att'y Gen 310 (1882) (holding absent congressional guidance, military courts are governed by the same rules of evidence as "ordinary courts of criminal jurisdiction")). These common law rules were scrupulously applied to the Philippine military commissions. For example, where hearsay was admitted, convictions were upheld only if proven by untainted evidence; otherwise they were disapproved. *Id.* (citing Headquarters, Division of the Philippines, G.O. 179, Jul. 19,

1901, in *Charges of Cruelty, Etc. to the Natives of the Philippines*, S. Doc. 57-1 No. 205 Pt. 2. at 218 (1902) ("S. Doc. 57-1"); Headquarters, Division of the Philippines, G.O. 31, Jun. 11, 1900 in 2 S. Doc 57-1, at 9). Confessions could only be introduced with a showing of voluntariness and independent evidence of the crime. *Id.* at 52 (citing Headquarters, Division of the Philippines, G.O. 232, Aug 22, 1901 in 2 S. Doc 57-1, at 363). Improper application of protections against self-incrimination and an erroneous ruling that a witness was incompetent to answer a question to the detriment of the accused were sufficient to overturn a murder conviction. *Id.* at 52 (citing Headquarters, Division of the Philippines, G.O. 44, Mar. 7, 1901 in 2 S. Doc 57-1, at 120). Philippine military commissions also conformed to other generally accepted principles of procedural justice, with convictions overturned for failure to hear all available evidence, *id.* (citing Headquarters, Division of the Philippines, G.O. 232, Aug 22, 1901, in S. Doc 57-1, at 363, Headquarters, Division of the Philippines, G.O. 39, Feb. 27, 1901, in S. Doc 57-1, at 116,) or from double jeopardy concerns, *id.* (citing Headquarters, Division of the Philippines, G.O. 24, Feb 1, 1901, in S. Doc 57-1, at 104). Of particular note is the fact that the author of the predecessor to Article 36, Judge Advocate General Crowder, was the senior military lawyer and legal advisor to U.S. commanders in the Philippines from July 1898–July 1901. *Id.* at 53 (citing David A. Lockmiller, ENOCH H. CROWDER 66-84 (1955)).

d. As of 1916, Military Commissions Afforded a Core Group of Procedural Safeguards That Generally Were Identical to Those Provided in Courts-Martial.

When Congress enacted the predecessor to Article 36, the history plainly shows that the practice was for military commissions to provide a baseline set of rights, generally

identical to those provided in courts-martial. At that time, these rights included:

- Neutral decision makers;
- Rules of evidence generally equivalent to those used in criminal trials in the federal district courts, including a presumption against the admissibility of hearsay;
- The right to have all evidence considered;
- The right against double jeopardy; and
- The right to collateral review of one's conviction.

See *supra* pp. 22-26; *Ex Parte Milligan*, 71 U.S. 2, 121-22 (1866) (granting petition for habeas corpus from conviction by military commission).[8] This history provides a minimum standard that informed Congress's understanding of the term "military commission."

3. The Tribunals Established by the Military Order Lack Necessary Features of Military Commissions as They Have Been Historically Understood.

As detailed in Part II.C.2., *supra*, in the years preceding the enactment of the predecessor to Article 36, military commissions historically incorporated critical procedural safeguards, mirroring courts-martial in most respects.[9] By

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8. The modern version of the Uniform Code of Military Justice permits appeal to the Supreme Court through a writ of *certiorari*. 10 U.S.C. § 867(a).

9. To be sure, during World War II, there were deviations from this historical pattern. See, *e.g.*, *In re Yamashita*, 327 U.S. 1, 23 (1946). It is *amici*'s position that the history preceding (and informing) the enactment of the statutory predecessor to Section 836 should control.

(Cont'd)

contrast, the military commissions established by the Military Order lack these procedural safeguards.[10] Specifically:

- The Military Order fails to provide neutral decisionmakers because it expressly allows review only by the President or, if he so chooses, the Secretary of Defense. 66 Fed. Reg. § 4(c)(8).
- The Military Order, which adopted a standard for admissibility of "[t]he probative value to a reasonable man," *Id.* at § 4(c)(3), permits significant deviations from the evidentiary rules historically used in military

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(Cont'd)

and that the World War II cases, like their sister case of *Korematsu* v. *United States*, 323 U.S. 214 (1944) (upholding internment of persons of Japanese ancestry), should be viewed as aberrations. See Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903, § 1989a (1988) (officially apologizing for "fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry").

10. In its brief below, the Government argued that if the Court required military commissions to use the same procedures as courts-martial, the words "military commission" would be superfluous in the Uniform Code of Military Justice. The Government's argument is flawed for two reasons. First, as *amici* argue in this brief, the Court need only hold that Congress intended military commissions to utilize certain core procedures necessary to ensure accurate results and basic procedural fairness in order to reject the procedurally inadequate military commissions created by the Military Order. Second, even if the Court were to hold that military commission procedures must track court-martial procedures identically, the words "military commission" in the Uniform Code of Military Justice would not be superfluous because military commissions and courts-martial have historically had different, although somewhat overlapping, jurisdictions.

commissions and today used in both courts-martial and the federal district courts.[11]

- The Military Order specifically denies access to any form of judicial review, including (apparently) federal collateral review. *Id.* at §7(b)(2).[12]

These aberrations are inconsistent with the historical understanding of what constitutes a military commission. Equally important, as historical figures such as General Halleck acknowledged, (see *supra* p. 24), application of the historical procedures is crucial for ensuring both that defendants before military commissions get fair trials and that the outcomes of the trials are reliable. Because of his failure to include these minimum procedural rights in the Military Order, the President exceeded his authority under Article 36 and, therefore, the Court should reject these military commissions.

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11. The standing Military Rules of Evidence employed in courts-martial are based almost verbatim on the Federal Rules of Evidence. Compare, *e.g.*, Military R. Evid. 401–03 (governing relevancy and unfair prejudice) and Military R. Evid. 801–07 (governing the admissibility of hearsay) with Fed. R. Evid. 401-03 and Fed. R. Evid. 801-07.

12. *Amici* acknowledge that there are other ways in which the military commissions created by the Military Order varies from modern court-martial and district court procedure. As explained above, (see *supra* Part B), *amici* believes that these variations are not authorized and should be rejected. Here, by contrast, *amici* are focusing on the ways that the procedure of the military commissions at issue vary from historical practice, which forms a procedural minimum implicit in Congress's use of the term "military commission."

CONCLUSION

To promote the rule of law, to maintain America's moral supremacy, and to avoid impairment of America's ultimate victory in the war on terror, it is critical that the military commissions conduct their work in full accord with American constitutional law and its best historical precedent. This Court should reverse the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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